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NO. 85-107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GUISEPPE CASTORINA,
Petitioner

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

PARENT COMPANY

Lykes Bros. Steamship Co., Inc.'s parent company is Interocean Steamship Corp.

STATUTES

Longshoremen's and Harbor Workers' Compensation Act
33 U.S.C. § 905(a):

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Longshoremen's and Harbor Workers'
Compensation Act Amendments of 1984,
Pub. L. No. 98-426, 98 Stat. 1639 (1984)

28(g) For purposes of this section—

(1) in the case of an occupational disease which does not immediately result in a disability or death, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disease.

III

29 C.F.R. § 1504.3 (1965):

Definitions.

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employment, as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States.

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REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS, CORRECTLY AND IN ACCORDANCE WITH OTHER CIRCUIT COURT DECISIONS, RULED THAT THE LAW IN EFFECT AT THE TIME OF MANIFESTATION OF THE OCCUPATIONAL DISEASE CONTROLS.

The Court below correctly determined that the law in effect at the time the occupational disease manifests itself is controlling. Thus, since Castorina's asbestosis

manifested itself no earlier than 1975, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. (1978) as amended in 1972 was determined to be applicable. The court was mindful of the distinction between a traumatic injury and an occupational disease having a long latency period, such as asbestosis, and distinguished cases such as *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). Rather than ruling in a manner inconsistent with other circuits, the Fifth Circuit's opinion in this case relies heavily on *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) cert. denied 52 U.S.L.W. 3756 (1984). It is not coincidental that Castorina makes no reference to *Black* in his petition. The *Black* Court adopted the date of manifestation rule as opposed to the date of last exposure approach reasoning that it best accomplished the underlying purposes of the LHWCA. Those cases, which Castorina relies upon in asserting there is a conflict among the circuits regarding when an injury occurs, do not involve maritime law, do not involve the LHWCA, and are not on point. Instead, *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), cert. denied 454 U.S. 1109 (1981) and *I.N.A. v. Forty Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), cert. denied 454 U.S. 1109 (1981) both involve interpretation of the language in insurance contracts.

Moreover, the adoption of the date of manifestation rule is consistent with the intentions of Congress as found in the 1984 amendments to the LHWCA, Pub. L. No. 98-426, 98 Stat. 1639 (1984). Specifically, Section 28(g) of the 1984 amendments provides that "in the case of an occupational disease which does not immediately result

in a disability or death, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disease. . . ." The provisions of Section 28 of the 1984 amendments provide for the effective date of those amendments to claims brought under the act. Paragraph (g) of Section 28 clearly provides that, in the instance of an occupational disease, the date of injury, for the purpose of determining the effective date of the 1984 amendments, is to be determined according to the manifestation rule. Further, the provisions of Section 28(g) clearly evidence a Congressional intention that the manifestation rule should be utilized to determine the law applicable to any claim, including third party suits, under the LHWCA.

Still further, the legislative history of the 1984 amendments to the LHWCA also evidences Congress' intent to adopt the manifestation rule as the uniform rule for determining time of injury in occupational disease cases and the law applicable to claims or suits for occupational diseases. Particularly, it should be noted that the Joint Conference Committee Report stated: "The time of injury for cases involving an occupational disease shall be the time when the claimant becomes aware, or in the exercise of reasonable diligence or by way of medical advice should have been aware of the relationship between the employment, the disease, and the death or disability. The conferees specifically reject the date of last exposure to the injurious substance as the time of injury for determination of pay purposes." House Conference Rep. No. 98-1027, Reprinted in U.S. Code Cong. & Ad. News, 2771, 2779-80 (November 1984). Contrary to

the assertions of Castorina, the opinion of the Fifth Circuit in the instant case is consistent with other circuit authority and the intentions of Congress as revealed through the legislative history of the 1984 amendments to the LHWCA.

II.

REGARDING THE APPLICATION OF OSHA REGULATIONS, THE FIFTH CIRCUIT CORRECTLY RULED THAT LYKES, AS SHIPOWNER, DID NOT VIOLATE ANY DUTY OWED TO CASTORINA.

While Castorina has stated the question presented in the instant case to be "whether Lykes as shipowner, employer of seamen, was obligated to follow OSHA regulations and provide respirators to the longshoremen, employees of Lykes as stevedore," he cites no persuasive authority from any other circuit dealing with this issue in a manner inconsistent with the opinion of the court below. Castorina relies upon 29 C.F.R. § 1504.102(c)(1) (1965) providing that "for protection against pneumoconiosis producing dusts, a respirator equipped with a type of filter provided for such purposes shall be used." This regulation imposes a duty only on Lykes in its capacity as stevedore, not in its capacity as vessel owner. Section 1504.2 of the regulations places responsibility for compliance on "employers" which is defined as "an employer any of whose employees are employed, in whole or in part, in longshoring operations." 29 C.F.R. § 1504.3 (c). Thus, in its capacity as shipowner and in its capacity as an employer of seamen, Lykes had no duty to comply with the regulation in question. Further, under § 905(b), "a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence

in its 'stevedore' capacity." *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, n.6 (1983). Any violation of the regulation by Lykes, as stevedore, would be without legal effect, in this action against Lykes, as shipowner.

Castorina's reliance on *American Petroleum Institute v. OSHA*, 581 F.2d 493 (5th Cir. 1978), aff'd 448 U.S. 607 (1980) and *Beatty Equipment Leasing Inc. v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978) is misplaced. *American Petroleum* concerned a petition for review of a new health standard which had been promulgated by OSHA regarding the acceptable levels of exposure to benzene. The regulations at issue also included labeling provisions which required employers to assure that caution labels are affixed to containers of benzene and benzene-containing products. The court's statements on the labeling regulation were dicta. The regulations required the employers to "assure that the caution labels remain affixed when the benzene or products containing benzene are sold, distributed, or otherwise leave the employer's work place." *American Petroleum Institute v. OSHA*, supra at 508. Clearly, the responsibility for complying with the regulation at issue in *American Petroleum* was expressly placed upon the employers. This is contrary to the longshoring regulation relied upon by Castorina, compliance with which would be the responsibility of Lykes as stevedore, not as vessel owner. Likewise, in *Beatty Equipment Leasing*, responsibility for complying with the regulation in question was expressly placed upon the employer.

The cases cited by Castorina do not support the conclusion that the regulations in question are applicable to a shipowner. In *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964), the court was concerned with

a violation of Coast Guard regulations, not OSHA regulations. This is a critical difference since Coast Guard regulations, as the court explained, are made applicable to shipowners. *Id.* at 134 and n.6. Additionally, in *Marshall,* the Court was concerned with an accident occurring prior to the 1972 Amendments of the LHWCA. Similarly, *Reyes v. Vantage Steamship Co., Inc.,* 558 F.2d 238 (5th Cir. 1977) concerned Coast Guard regulations which were expressly made applicable to shipowners. Moreover, *Reyes* involved a claim relating to the death of a seaman, not a longshoreman, under the Jones Act, not the LHWCA. In this connection, the trial court determined, as a matter of fact, that Lykes carried the asbestos cargos in conformity with all shipping regulations, specifically the regulations promulgated by the United States Coast Guard. Finding of Fact, 8.

Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963) cert. denied 376 U.S. 952 (1964) fails to add to the analysis of the instant matter since it was concerned with pre-1972 law under the LHWCA and principally the doctrine of unseaworthiness. Although the Court in *Provenza* explained that the negligent violation of a safety regulation by the stevedore may form the basis for liability as against the shipowner under circumstances where the vessel owner knew or should have known of the stevedore's violation, the factual determination, as discussed by the unanimous circuit court, was that Lykes did not negligently fail to step in and halt the stevedoring operations after becoming aware that the longshoremen were not wearing respirators since Lykes did not know nor should it have known that the condition was unreasonably dangerous. Moreover, as shipowner, Lykes was entitled to rely upon its stevedoring department to act properly.

The opinion of the Ninth Circuit in *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979) vacated on other grounds, 451 U.S. 978 (1981) is of little force since the Supreme Court vacated that opinion following its opinion in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981). Although *Arthur v. Flota Mercante Gran Centro Americana S.A.*, 487 F.2d 561 (5th Cir. 1973) was decided following the 1972 amendments of the LHWCA, it concerned a pre-amendment accident and pre-amendment law. Furthermore, the Fifth Circuit, subsequent to its opinion in *Arthur,* has clearly stated that the regulations in question cannot be utilized by a longshorman in his lawsuit against a shipowner. *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977).

III.

THE COURT OF APPEALS CORRECTLY RULED THAT LYKES, AS SHIPOWNER, WOULD NOT BE LIABLE FOR ANY OSHA VIOLATION BY ITS STEVEDORE ARM. FURTHER, THE RULING IS NOT CONTRADICTORY TO ANY FUNDAMENTAL CORPORATE PRINCIPLES.

Section 5(a) of the LHWCA states that "the liability of an employer prescribed in Section 4 of this Act shall be exclusive and in place of all other liability of such an employer to the employee . . ." In the situation, however, where the employer is also the vessel owner, as in the instant action, a separate action is authorized against the employer, but only in its capacity as vessel owner. The Act specifically provides, however, that "no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring

services to the vessel." 33 U.S.C.A. § 905(b). "Of course, Section 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983) n.6. The legislative history demonstrates the intent of Congress that "the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4705.

Contrary to the assertions of Castorina, the court below correctly analyzed Lykes' responsibility to Castorina as shipowner versus Lykes' responsibility to Castorina as stevedore-employer. Castorina argues, in essence, that Lykes as owner should be responsible for any OSHA violations committed in its stevedore capacity. Such reasoning turns *Pfeiffer* on its head. A longshoreman employed by the shipowner to perform stevedoring operations on the vessel is entitled only to the same treatment as if he were employed in the typical tripartite situation, i.e. vessel owner, independent stevedore, and longshoreman. Such a longshoreman, however, is not entitled to preferential treatment which would necessarily be a result of allowing him to make a third-party action recovery from the vessel owner by reason of the stevedore's violation of regulations. Clearly, the longshoreman could not recover against a vessel owner solely on the basis of an independent stevedore's violation of a regulation; the result should be no different when the stevedore and owner are the same company. Further, the owner-stevedore, for actions committed in its stevedoring capacity,

is entitled to the exclusive liability provisions of the LHWCA. 33 U.S.C.A. § 905(a).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 9th day of August, 1985, three true and correct copies of the foregoing instrument were sent by regular mail to Mr. Stephen M. Vaughan, Mandell & Wright, 806 Main Street, 21st Floor, Houston, Texas 77002.

Ben L Reynolds

BEN L. REYNOLDS